

1 Improvement Techniques, Inc. ("GIT" or Appellant) to clean up the
2 Slick Rock, Colorado site. (Id.) The project encountered problems,
3 and in September 1995, MK terminated the subcontract and sued GIT
4 for damages in the District of Colorado. (Id.) GIT counterclaimed
5 for wrongful termination. (Id.) The case went to trial in November
6 1996, and the jury found in favor of GIT for wrongful termination
7 and awarded GIT \$5.6 million. (AA 847.) MK appealed, and the Tenth
8 Circuit Court of Appeals affirmed the ruling on liability, but
9 remanded the matter for a new trial on damages. (AA 874.)

10 On May 14, 2001, WGI and other related entities filed petitions
11 under Chapter 11, Title 11 of the United States Code in the United
12 States Bankruptcy Court for the District of Nevada, Reno Division
13 (Case No. BK-N-01-31627). The second trial on damages was stayed by
14 the bankruptcy filing. On August 24, 2001, GIT moved for relief
15 from the automatic stay to allow a retrial on the issue of damages,
16 contending that "any damages shall be paid directly from credit
17 and/or property of the [DOE] and not from property of the Debtor's
18 bankruptcy estate." (AA 899-906.) The bankruptcy court granted
19 GIT's request for relief from the automatic stay for a retrial on
20 damages. (AA 909-916.)

21 By December 21, 2001, WGI's Second Amended Joint Plan of
22 Reorganization ("the Plan") was confirmed. (AA 71.) The Order
23 confirming the Plan provided, *inter alia*, that "[n]otwithstanding
24 anything in the Plan or this Order to the contrary, Ground
25 Improvement Techniques, Inc. may continue its litigation to final
26 judgment and final confirmation of the Plan will not affect the

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1 rights of Ground Improvement Techniques, Inc. other than the
2 statutory discharge granted to the Debtors.” (AA 105.)

3 At the retrial in May 2006, the jury awarded GIT over \$15
4 million in damages. (AA 882.) GIT collected approximately \$7.8
5 million against the supersedeas surety. (Appellant’s Opening Br. at
6 10 (#16).) A Second Modified Amended Judgment was rendered
7 adjudicating \$9,842,711.00 in yet unsatisfied principal plus post-
8 judgment interest (from August 16, 2006) in favor of GIT. (AA 977-
9 981.)

10 In May 2010, WGI’s Plan Committee asked the bankruptcy court to
11 direct GIT and reorganized WGI to first seek collection from the DOE
12 for any principal amounts that could also be recoverable against the
13 Plan Committee’s Creditor’s Trust. (AA 814.) GIT joined in the
14 motion and sought authority to collect directly against the DOE the
15 full amount of principal, but objected to the extent that the Plan
16 Committee requested that GIT should not be allowed to collect
17 interest on its judgment. (AA 960.) The bankruptcy court granted
18 the Plan Committee’s motion and adopted GIT’s joinder relief in
19 part, but limited GIT’s direct collection against the DOE to the
20 principal judgment amount of \$9,842,711.83. (AA 1380.)
21 Specifically, the bankruptcy court precluded GIT from collecting the
22 award of accruing interest from the DOE. (Id.)

23 On August 4, 2010, the bankruptcy court mandated certification
24 and collection by GIT of the principal sum of GIT’s judgment against
25 the DOE. (AA 1377, 1385.) GIT is authorized to certify, prosecute,
26 and directly collect the principal judgment award against the DOE,
27 but not the accruing interest. (AA 1383, 1387.)

1 On August 17, 2010, GIT filed a Motion for Reconsideration (AA
2 1390) requesting that the bankruptcy court reconsider its ruling
3 that GIT may not collect post-judgment interest from the DOE. The
4 bankruptcy court denied GIT's motion on November 15, 2010. (AA
5 1563.) GIT appealed.

6 On December 17, 2010, the appeal was transferred to this Court
7 by election of a party to the appeal (#1). On February 1, 2011,
8 Appellant filed its Opening Brief (#16). On February 22, 2011,
9 Appellees filed their Answering Brief (#20). On March 8, 2011,
10 Appellant filed its Reply Brief (#21). On the same date, Appellant
11 filed its Motion for Hearing (#22). A hearing on the appeal was
12 held on September 26, 2011.

13 14 **II. Jurisdiction**

15 United States District Courts have jurisdiction to hear appeals
16 from "final judgments, orders, and decrees" of the bankruptcy court
17 pursuant to 28 U.S.C. § 158(a)(1), as well as certain interlocutory
18 orders described in 28 U.S.C. § 158(a)(2). A party may also, "with
19 leave of the court," appeal from other interlocutory orders and
20 decrees pursuant to 28 U.S.C. § 158(a)(3). See In re City of Desert
21 Hot Springs, 339 F.3d 782, 787 (9th Cir. 2003) (noting that the
22 district court must hear appeals from final decisions of the
23 bankruptcy courts, but it is within the discretion of the district
24 court to hear appeals of interlocutory orders).

25 Here, the bankruptcy court's order constitutes a final order
26 within the meaning of 28 U.S.C. § 158(a)(1) because it represents
27 the bankruptcy court's final resolution of the parties' rights with
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1 regard to Appellant's claim for post-petition interest. See id. at
2 788 (describing the Ninth Circuit's "'pragmatic' approach to
3 deciding whether orders in bankruptcy cases are final, 'recognizing
4 that certain proceedings in a bankruptcy case are so distinct and
5 conclusive either to the rights of individual parties or the
6 ultimate outcome of the case that final decisions as to them should
7 be appealable as of right.'" (quoting In re Mason, 709 F.2d 1313,
8 1317 (9th Cir. 1983)). As such, we have jurisdiction over the
9 appeal pursuant to section 158(a).

11 III. Standard of Review

12 We review the bankruptcy court's application of the Bankruptcy
13 Code to the Plan *de novo*.¹ See Temecula v. LPM Corp. (In re LPM
14 Corp.), 300 F.3d 1134, 1136 (9th Cir. 2002).

17 ¹ The bankruptcy court held that "[t]he post-judgment interest
18 awarded by the Colorado District Court in connection with the Judgment
19 is unmaturing interest as of the Petition Date. Unmatured interest is
20 not allowable under Bankruptcy Code Sec 502(b)(1) and pursuant to
21 Article 7.2 of the Plan as previously found by this Court and upheld
22 on appeal by the United States District Court for the District of
23 Nevada." (AA 1380-81.) To the extent that our Order reviews the
24 bankruptcy court's interpretation of its confirmation order and the
25 Plan itself, a more deferential abuse of discretion review may be
26 appropriate, though neither the Ninth Circuit Court of Appeals nor the
27 Ninth Circuit BAP has ruled on the issue. See, e.g., Travelers Indem.
28 Co. v. Bailey, 129 S. Ct. 2195, 2204 n.4 (2009) (noting that
"[n]umerous Courts of Appeals have held that a bankruptcy court's
interpretation of its own confirmation order is entitled to
substantial deference" and collecting cases); but see In re
Consolidated Water Utilities, Inc., 217 B.R. 588, 590 (B.A.P. 9th Cir.
1998) (discussing Ninth Circuit case law that may suggest deference
should not be given). However, the arguments presented to this Court
have focused on the bankruptcy court's interpretation of § 502(b)(2)
rather than on the court's interpretation of the Plan, and therefore
we apply a *de novo* standard of review.

IV. Discussion

Appellant asserts that the bankruptcy court incorrectly applied 11 U.S.C. § 502(b)(2) in disallowing post-petition interest on its judgment against the DOE. Section 502(b)(2) provides that the court should disallow claims for unmatured interest. Appellant argues that because its claim for post-petition interest is against the DOE, and not the bankruptcy estate, § 502(b)(2) does not apply, and furthermore, the bankruptcy court violated 11 U.S.C. § 524(e) by discharging the DOE from its independent obligation owed to Appellant.

The bankruptcy court in this case relied on a previous decision by this Court. In Hathaway v. Raytheon Engineers & Constructors, Inc. (In re Washington Group International, Inc.), we ruled that tort claimants who had obtained a judgment against a Chapter 11 debtor in a personal injury suit could not collect post-petition interest from the debtor's insurer. 432 B.R. 282 (D. Nev. 2010). While examining the present case, we reconsidered our analysis in Hathaway and have found reason to question our prior holding.²

A. Policy Reasons Behind 11 U.S.C. § 402(b)

In 1964, the United States Supreme Court explained that "[t]he basic reasons for the rule denying post-petition interest as a claim against the bankruptcy estate are the avoidance of unfairness as

² Let us be the first to acknowledge that the bankruptcy judge was certainly appropriately entitled to rely on our previous published decision on this issue. We regret having misled our colleague. Judges are generally reluctant to reverse prior decisions for reasons of personal pride and because it undermines confidence in and reliance on our decisions. I have often said it takes a real judge to admit that he is wrong. There is, however, an overriding obligation to do justice and that we apply.

1 between competing creditors and the avoidance of administrative
2 inconvenience.” Bruning v. United States, 376 U.S. 358, 362
3 (1964).³ The Supreme Court quoted American Iron & Steel
4 Manufacturing Company v. Seaboard Air Line Railway to explain that
5 the rule against post-petition interest “is not because the claims
6 had lost their interest-bearing quality during that period, but is a
7 necessary and enforced rule of distribution, due to the fact that .
8 . . assets are generally insufficient to pay debts in full.”
9 Bruning, 376 U.S. at 362 n. 4 (quoting American Iron & Steel, 233
10 U.S. 261, 266 (1911)). The first reason behind disallowing post-
11 petition interest, the concern about fairness among creditors, lies
12 in the fact that some debts may carry a high rate of interest and
13 some a low rate. Id. Allowing post-petition interest would then
14 result in inequality in the payment of interest accrued during the
15 delay incident to bankruptcy proceedings. Id. The Supreme Court
16 also quoted American Iron & Steel for the proposition that interest
17 should be paid if the estate proves solvent. Id. The Supreme
18 Court’s hint that a solvent estate should pay post-petition interest
19 lends credence to the idea that the rule against post-petition
20 interest is not in any way a judgment on the merits of post-petition
21 interest, but merely a rule of distribution meant to maximize
22 fairness in bankruptcy. See id. In accordance with the note in
23 Bruning, lower courts have ruled that solvent estates should pay

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25 ³ While Bruning was decided before the Bankruptcy Reform Act of
26 1978, courts continue to apply the reasoning in Bruning to cases
27 arising under § 502(b)(2) of the Bankruptcy Reform Act of 1978. See,
28 e.g., Leeper v. Pennsylvania Higher Educ. Assistance Agency, 49 F.3d
98, 104-05 (3d Cir. 1995); Metro Commercial Real Estate, Inc. v.
Reale, 968 F. Supp. 1005, 1007-08 (E.D. Pa. 1997).

1 post-petition interest despite § 502(b)(2). See, e.g., In re Fast,
2 318 B.R. 183, 190 (Bankr. D. Colo. 2004); see also United States v.
3 Alaska National Bank of the North, (Matter of Walsh Constr., Inc.),
4 669 F.2d 1325, 1330 (9th Cir. 1982) (noting that one exception to
5 the rule against post-petition interest is when the alleged bankrupt
6 proves solvent).

7 Appellee suggests that allowing the collection of post-petition
8 interest implicates concerns about fairness among creditors. We
9 reject this argument, however, because our reading of Bruning is
10 that the fairness among creditors is only a concern when the estate
11 is insolvent, and the creditors would be paid interest out of the
12 estate, thereby reducing the recovery of certain creditors with low
13 interest rate debts compared to creditors with high interest rate
14 debts. This interpretation is bolstered by the fact that 11 U.S.C.
15 § 506(b) provides that an oversecured creditor is entitled to
16 interest on its claim. Section 506(b) is an exception to the
17 prohibition against post-petition interest provided in § 502(b)(2).⁴
18 As in the oversecured creditor example, allowing GIT to collect
19 post-petition interest from a third-party non-debtor, the DOE, does
20 not implicate questions of fairness among creditors. Collection
21 from a third party cannot reduce the available funds in the estate
22 for other creditors. There is no dispute that a creditor can obtain
23 payment from a third party such as an insurance company or a

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25 ⁴ Because we ultimately determine that § 502(b)(2) applies only
26 to claims against the estate, the fact that there is no express
27 exception applicable to guarantors, insurance companies, or third-
28 party non-debtors in general, is not fatal to our conclusion that GIT
is entitled to collect post-petition interest from the DOE.

1 guarantor. Allowing post-petition interest when the third party is
2 obligated to pay, and can make the payment in full, does not detract
3 from other creditors.

4 Of course, the question then becomes, what if the third-party
5 non-debtor cannot pay in full? If the third party can only pay, for
6 example, money to cover interest and only part of the principal,
7 should the creditor then be allowed to make a claim against the
8 estate for the remainder of the principal, and thereby reduce the
9 available funds in the estate and negatively impact fairness among
10 creditors, in a way that it would not be able to do if the creditor
11 could not collect post-petition interest from the third party? This
12 precise question was answered by the Court of Appeals for the Fourth
13 Circuit in 2007. See In re Nat'l Energy & Gas Transmission, Inc.,
14 492 F.3d 297 (4th Cir. 2007). In that case, a creditor obtained
15 partial payment from a guarantor of the debtor, attempted to apply
16 that payment to post-petition interest before applying the remainder
17 to partial satisfaction of principal, and then tried to collect the
18 remainder of the principal from the bankruptcy estate. Id. at 300.
19 The question of whether post-petition interest may be collected from
20 a guarantor was not before the Fourth Circuit, which accepted that a
21 guarantor is liable for post-petition interest based on prior
22 caselaw. Id. at 303 n. 5. The Fourth Circuit ruled that the
23 creditor could not classify payment from a non-debtor guarantor as
24 non-principal and thus preserve the full value of the principal for
25 collection in bankruptcy when the guarantee is insufficient to cover

1 both principal and interest.⁵ Id. at 303. The Fourth Circuit did
2 not rule that a creditor is prohibited from collecting post-petition
3 interest from the third-party guarantor, it merely held that the
4 creditor could not apply the payment from the guarantor to interest
5 first when the payment was insufficient to cover both principal and
6 interest, and then attempt to collect the principal from the estate,
7 because § 502(b)(2) prevents the creditor from collecting post-
8 petition interest from the estate. Id.

9 In re National Energy shows that simply allowing the collection
10 of post-petition interest from non-debtors will not result in the
11 collection of post-petition interest from the bankruptcy estate,
12 even if the non-debtor payment is insufficient to cover both
13 principal and interest and the creditor may still have claims
14 against the bankruptcy estate. Furthermore, in our case, it has not
15 been shown that there is anything but the most hypothetical
16 suggestion that GIT would not be compensated in full by the DOE and

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18 ⁵ Judge Duncan filed a scathing dissent to In re National Energy,
19 stating that "it is also well-settled that § 502(b)(2) has no impact
20 on the accrual of unmatured interest against non-debtors, including
21 non-debtor guarantors." Id. at 304 (Duncan, J., dissenting)
22 (citations omitted). Judge Duncan suggests that the majority's
23 approach in In re National Energy undermines not only the idea that
24 § 502(b)(2) only operates on claims against the bankruptcy estate and
25 not third parties, but also § 524(e), which provides that the
26 discharge of a debt of the debtor does not affect the liability of any
27 other entity on such debt. Id. at 305 (Duncan, J., dissenting). He
28 further concludes that a creditor's receipt of payment from a non-
debtor guarantor does not implicate fairness as between competing
creditors or administrative inconvenience. Id. While the question
of the proper allocation of a non-debtor's payment to principal or
interest is not before us, we note that only allowing a creditor post-
petition interest when the third party can satisfy the debt in full,
including interest, mirrors § 506(b)'s provision that a secured
creditor may collect post-petition interest when his collateral is of
sufficient value to satisfy principal and interest.

1 would have to seek collection from the bankruptcy estate. Even if
2 that unlikely scenario comes to pass, it is undisputed that GIT
3 cannot collect post-petition interest from the estate. Merely
4 allowing GIT to collect that interest from a third party does not
5 negatively affect the available funds in the estate, and therefore
6 cannot result in unfairness among creditors.⁶

7 The second reason for disallowing post-petition interest, that
8 of the avoidance of administrative inconvenience, has been explained
9 as follows. Disallowing post-petition interest avoids
10 administrative inconvenience "by ensuring that it is 'possible to
11 calculate the amount of claims easily.'" In re Kielisch, 258 F.3d
12 315, 321 (4th Cir. 2001) (quoting In re Hanna, 872 F.2d 829, 830
13 (8th Cir. 1989)). Appellees repeatedly argue that if the DOE does
14 not pay the judgment in full, GIT can then come to the estate and
15 thereby cause administrative inconvenience as well as unfairness
16 among creditors. We find that Appellees' argument is merely a red
17 herring, one that misses the point of the concern about
18 administrative inconvenience with relation to post-petition
19 interest. It is, of course, undoubtedly true that GIT could make a
20 claim against the estate if the DOE does not pay the judgment amount

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22 ⁶ Appellees suggested that it would be unfair to allow GIT to
23 collect post-petition interest when other unsecured creditors may not.
24 However, the Bankruptcy Code provides that oversecured creditors may
25 collect post-petition interest. The unfairness that must be prevented
26 is unfairness unavoidable due to the bankruptcy, that is, awarding a
27 windfall incident to the delay inherent in bankruptcy proceedings to
28 creditors with high interest rates. When a creditor is repaid on its
claim by a third party source, such as by a guarantor, or an insurance
company, they are receiving more than they would from the estate, but
satisfaction by a third party does not diminish the funds available
in the estate for other creditors, and therefore does not cause
unfairness.

1 in full. However, GIT already holds that right, and will continue
2 to hold that right regardless of whether it is entitled to collect
3 post-petition interest from the DOE. The relevant question is
4 whether GIT will inconvenience the administration of the estate by a
5 ruling in its favor on post-petition interest. Allowing post-
6 petition interest claims against the estate would inconvenience the
7 administration of the estate because each claim may have a different
8 interest rate, thereby complicating calculation of the amount of
9 each claim. See In re Kielisch, 258 F.3d at 321; In re Hanna, 872
10 F.2d at 830. Allowing post-petition interest against a *third party*,
11 however, would not result in the same burden against the estate.
12 Furthermore, we note that the Supreme Court has hinted, and several
13 lower courts have held, that solvent estates should pay not only
14 principal, but also interest to its creditors. See, e.g., Bruning,
15 376 U.S. at 362 n. 4; In re Fast, 318 B.R. at 190; see also Matter
16 of Walsh, 669 F.2d at 1330. Therefore, even the possibility of
17 administrative inconvenience in calculating claims is subordinate to
18 the principle that creditors should get their due, with some
19 reasonable limitations placed by the Bankruptcy Code in order to
20 promote fairness and administrative efficiency.

21 The bankruptcy court's concern that creditors may be treated
22 unfairly and that the administration of the estate could possibly be
23 inconvenienced is, of course, entitled to some deference.⁷ (AA 1541-

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25 ⁷ In its order, the bankruptcy court merely states that post-
26 judgment interest is unmaturing interest not allowable under § 502(b).
27 (AA 1380.) The bankruptcy court expressed some concern over whether
28 unfairness or inconvenience could result from allowing GIT to collect
post-petition interest from the DOE, but we do not believe that those
concerns, articulated at the hearing and not included in the final

1 1542, 1550.) However, we believe that the bankruptcy court may not
2 have considered the Fourth Circuit's ruling in In re National
3 Energy, which was never presented to the bankruptcy court, as well
4 as the fact that GIT cannot and will not recover interest from the
5 estate as a result of a ruling that it can recover interest from the
6 DOE. The mere possibility that GIT may be able to make a claim
7 against the estate in the case that the DOE refuses or is unable to
8 pay the full judgment cannot be enough to prohibit GIT from
9 collecting post-petition interest from a third party, which does not
10 diminish available funds in the estate or change the calculation of
11 the amount of claims against the estate. With that understanding,
12 we cannot find that allowing GIT to collect post-petition interest
13 would unduly prejudice the administration of the estate, beyond very
14 speculative suggestions about the inconvenience of having to reject
15 a far-fetched claim by GIT, one that GIT assured the bankruptcy
16 court and this Court that it would not make.⁸

17 In Bruning, the Supreme Court held that post-petition interest
18 on an unpaid tax debt not discharged by bankruptcy remains a
19 personal liability of the debtor, because an action brought against
20 the debtor personally, rather than against the estate, "cannot
21 inconvenience administration of the bankruptcy estate, cannot delay
22 payment from the estate unduly, and cannot diminish the estate in

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24 order, rise to the level of findings that we must review for abuse of
25 discretion.

26 ⁸ GIT was willing to state that any ability to collect the post-
27 petition interest against the DOE "will not increase the [liability
28 of the] Plan Committee or the Class 7 creditors beyond the [principal
amount of the judgment]." (AA 1540.)

1 favor of high interest creditors at the expense of other creditors.”
2 Id. at 362; see also In re Foster, 319 F.3d 495, 498 (9th Cir. 2003)
3 (post-petition interest for nondischargeable child support
4 obligation is nondischargeable and may be collected personally
5 against debtor after the underlying debt is discharged in
6 bankruptcy); In re Artisan Woodworkers, 204 F.3d 888, 891-92 (9th
7 Cir. 2000) (post-petition interest on nondischargeable tax debts may
8 be recovered against a debtor after the underlying debt is
9 discharged in bankruptcy).

10 **B. Post-Petition Interest Against Non-Debtors**

11 Those cases involving debts such as child support obligations
12 or tax debts, however, may be distinguished from this case because
13 the debts on which interest accrues are not dischargeable in
14 bankruptcy and remain personal liabilities of the debtor. Whether
15 post-petition interest may be collected against a third-party non-
16 debtor is a question that has not been decisively answered by higher
17 courts. There has, however, been dicta that § 502(b)(2) operates
18 only on claims against the estate. See, e.g., In re Kielisch, 258
19 F.3d at 323 (“Section 502 bars creditors from making *claims* from the
20 bankruptcy estate for unmatured interest . . . but does not purport
21 to limit the *liability* on those claims, i.e., ‘debts’”) (emphasis in
22 original). At first glance, we agree that the Supreme Court’s
23 explanation of the policy behind Bruning, concerns of fairness among
24 creditors and avoidance of administrative inconvenience, is not
25 implicated when third-party payment is involved. However, because
26 this interpretation of § 502(b)(2) is not necessarily apparent from
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1 the express language of the Bankruptcy Code, we sought caselaw on
2 the subject of third-party post-petition interest payment.

3 In several cases, lower courts have allowed post-petition
4 interest claims against non-debtors liable for the debt after the
5 debtor receives a discharge. See, e.g., Reale, 968 F. Supp. 1005,
6 1007 (partner liable for post-petition interest on a debt of the
7 partnership for which the partnership received a discharge in
8 bankruptcy); In re El Paso Refining, Inc., 192 B.R. 144, 146 (Bankr.
9 W.D. Tex. 1996) (guarantor liable for post-petition interest); In re
10 Stoller's, Inc., 93 B.R. 628, 635-36 (Bankr. N.D. Ind. 1988)
11 (guarantors liable for post-petition interest); but see Steering
12 Committees of Lake Road v. National Energy & Gas Transmission, Inc.,
13 No. AW-06-766, 2007 WL 2609430 at *3 (Bankr. D. Md. May 10, 2007)
14 (stating that § 502(b)(2) bars an unsecured creditor from recovering
15 interest on any type of claim, including an indemnity claim).
16 Courts have also held that when an estate is solvent, post-petition
17 interest may be collected from the estate. See, e.g., In re Fast,
18 318 B.R. 183, 190 (Bankr. D. Colo. 2004).

19 The ruling of the court in Reale that a partner to a
20 partnership in bankruptcy is still liable for post-petition interest
21 on a partnership debt was based on the Supreme Court's explanation
22 in Bruning of the policy behind the prohibition against collecting
23 post-petition interest. 968 F. Supp. at 1007-09. Because the
24 partner remained liable on the debt, and because fairness among
25 creditors and administration of the estate are not negatively
26 affected by the collection of post-petition interest from the
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1 partner, the court held that § 502(b)(2) simply does not apply. Id.
2 at 1009.

3 Because of the foregoing cases and the policy behind §
4 502(b)(2) examined in the previous section, we conclude that §
5 502(b)(2) applies only to claims made against the bankruptcy estate.

6 **C. Dependent Liabilities**

7 The conclusion that § 502(b)(2) applies only to claims against
8 the estate would appear to resolve this case. However, one question
9 remains: whether the characterization of the DOE's obligation as
10 independent or pass-through or otherwise dependent on the debtor
11 matters for purposes of § 502(b)(2), limiting the liability of the
12 third party to the amount collectable against the debtor.⁹ In

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14 ⁹ Both parties strenuously argue the issue of the relationship
15 of GIT to the DOE. GIT argues that there are facts suggesting an
16 implied-in-fact contract between GIT and the DOE. Appellees argue
17 that the facts do not show an implied-in-fact contract between GIT and
18 the DOE, and that privity is required for GIT to bring a suit directly
19 against the DOE. While we do not disagree that privity of some kind,
20 be it direct contractual relationship or an implied-in-fact
21 contractual relationship, is necessary for GIT to bring suit directly
22 against the DOE, we are unconvinced that these arguments have any
23 relevance to the question before the Court. GIT has not sought to
24 bring a direct action against the DOE. It has, instead, been allowed
25 to proceed nominally against WGI, the prime contractor, and to collect
26 the judgment in the name of WGI against the DOE. The district court
27 in Colorado stated that "[l]itigation costs and costs of judgments
28 under these circumstances, and in this case specifically, are the
obligation of the DOE." (AA 1419.) The court further noted that
WGI's intervening bankruptcy does not relieve the DOE of its
independent obligation to pay the judgment against WGI or any
settlement of that judgment. (AA 1420.) The bankruptcy court in this
case adopted those findings when it allowed GIT to submit its claim
in the name of WGI to the DOE. (AA 1381-83.) The Federal Circuit has
noted that while ordinarily, subcontractors do not have standing to
sue the government, "prime contractors often do allow subcontractors
to prosecute claims in the prime's name when they perceive that the
subcontractors really have more at stake in a claim and are therefore
willing to work harder on its enforcement." Erickson Air Crane Co.
of Washington Inc. v. United States, 731 F.2d 810, 813 (Fed. Cir.
1984). In insurance cases, many states do not allow an injured to

1 Hathaway, we stated that "[t]he insurer's liability, however, can be
2 no greater than that of the insured" and therefore "where the
3 insured's personal liability to the third party is limited or
4 reduced for one reason or another, so too would the insurer's
5 liability to the third-party be limited or reduced." 432 B.R. at
6 288. The bankruptcy court likewise held in the present case that
7 "[b]ecause any reimbursement obligation of the DOE on account of the
8 GIT Claim is coextensive with WGI's liability, any amounts collected
9 from the DOE on account of the GIT Claim cannot be an amount greater
10 than what could be recovered against WGI, and any recovery from the
11 DOE cannot be allocated to post-judgment interest." (AA 1381.) Both
12 our conclusion in Hathaway, and the bankruptcy court's holding in
13 this case, which is based on our decision in Hathaway, depend on the
14 idea that the third party's obligation is limited to the liability
15 of the debtor, and since the debtor cannot be forced to pay post-
16 petition interest, neither can the third party.

17 However, our statement in Hathaway that an insurer's liability
18 must be limited or reduced when the insured's liability is limited
19 or reduced was incorrect in light of 11 U.S.C. § 524(e), which
20 provides that "discharge of a debt of the debtor does not affect the
21 liability of any other entity on, or the property of any other
22 entity for, such debt" and in light of the proposition that "[i]t is
23 generally agreed that the debtor's discharge does not affect the

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25 bring a suit against the insurer without naming the insured. This
26 does not mean, however, that a claimant may not recover the full
27 amount of its judgment against the insurer despite bankruptcy
28 discharge of the insured. See, e.g., In re Coho Res., Inc., 345 F.3d
at 342-43. Therefore, we will not further address the parties'
arguments about privity or the lack thereof.

1 liability of the debtor's insurer for damages caused by the debtor."
2 In re Coho Res., Inc., 345 F.3d 338, 343 n. 14 (5th Cir. 2003)
3 (quoting 4 COLLIER ON BANKRUPTCY ¶ 524.05 (Alan N. Resnick & Henry J.
4 Sommer eds., 16th ed.)); see also Blecher v. Lore, 76 F. App'x 811
5 at *2 (9th. Cir. May 12, 2003) (debtors' discharge affects only
6 their personal liability on a claim, and not the validity of the
7 liability of their insurer, and creditor may sue the debtor in order
8 to obtain a judgment that insurer must pay despite bankruptcy
9 discharge of insured); In re Walker, 927 F.2d 1138, 1142 (10th Cir.
10 1991) ("[sec. 524(e)] permits a creditor to bring or continue an
11 action directly against the debtor for the purpose of establishing
12 the debtor's liability when, as here, establishment of that
13 liability is a prerequisite to recovery from another entity."). As
14 the Fifth Circuit notes, "it makes no sense to allow an insurer to
15 escape coverage for injuries caused by its insured merely because
16 the insured receives a bankruptcy discharge." In re Coho Res.,
17 Inc., 345 F.3d at 343 (quoting Houston v. Edgeworth (In re
18 Edgeworth), 993 F.2d 51, 54 (5th Cir. 1993)). Especially in the case
19 of an insurer, it can be argued that the insurer's liability depends
20 on the insured's liability; however, the crux of the matter is that
21 bankruptcy proceedings do not limit that liability when no other
22 rule of law otherwise limits that liability. That is, it would be
23 one matter if the judgment against the nominal defendant, payable by
24 the insurer, was reduced by state law related to the personal injury
25 claim. It is another matter to attempt to limit the insurer's
26 liability due to a bankruptcy rule, § 502(b)(2), which primarily
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1 exists to ensure fairness among creditors and avoidance of
2 inconvenience to the estate.

3 The monetary amount of the liability of WGI for wrongful
4 termination was decided in the District of Colorado, not in
5 bankruptcy. The judgment in that case provided for post-judgment
6 interest, as would be customarily included. That amount is the
7 liability of WGI, which the District of Colorado found is the
8 obligation of the DOE to pay. The fact that WGI is in bankruptcy
9 and need not pay post-petition interest does not reduce WGI's
10 liability independent of the bankruptcy, for which a third party is
11 obligated to pay. See Bruning, 376 U.S. at 363 n. 4 (rule against
12 interest in receivership cases "is not because the claims had lost
13 their interest-bearing quality during that period, but is a
14 necessary and enforced rule of distribution.") (citations omitted);
15 In re Coho Res., 345 F.3d at 343 ("[t]he 'fresh-start' policy is not
16 intended to provide a method by which an insurer can escape its
17 obligations based simply on the financial misfortunes of the
18 insured.") (citing In re Jet Florida Sys, Inc., 883 F.2d 970, 975
19 (11th Cir. 1989). Sec 502(b)(2) merely prohibits GIT from
20 collecting the interest from the bankruptcy estate. If the estate
21 is not solvent and the DOE does not pay the judgment amount, GIT
22 could recover only part of its judgment by bringing a claim against
23 the bankruptcy estate. That does not mean that GIT can recover only
24 that part of the judgment that would be collectable in bankruptcy
25 from the DOE. Instead, it is undisputed that GIT can recover the
26 full amount of the judgment from the DOE. We find that prohibiting
27 GIT from collecting post-judgment interest from the DOE is

1 unwarranted for the same reasons that GIT is not prohibited from
2 collecting the full principal amount from the DOE despite WGI's
3 bankruptcy.

4 Therefore, we conclude that whether the DOE's liability is
5 dependent on the debtor's liability is irrelevant to the question of
6 post-petition interest, and overrule our decision in Hathaway to
7 that extent.¹⁰ Furthermore, we hold that the bankruptcy court,
8 which based its decision on Hathaway, incorrectly applied §
9 502(b)(2) to prohibit GIT from collecting interest on its judgment
10 from the DOE, a third party to the bankruptcy case.¹¹

11 12 V. Conclusion

13 11 U.S.C. § 502(b)(2) prohibits the collection of unmatured
14 interest on claims against the bankruptcy estate in order to promote
15 fairness among creditors and to avoid administrative inconvenience.
16 DOE's obligation to pay the judgment amount, as determined by the
17 bankruptcy court and the district court in Colorado, is not limited
18 by that bankruptcy rule. Thus, we disagree with the bankruptcy
19 court's ruling, based on our previous decision in Hathaway, that GIT
20 may collect principal but not interest from the DOE, a third party
21 to the bankruptcy case.

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24 ¹⁰ Hathaway is currently being appealed to the Ninth Circuit.

25 ¹¹ We reject, however, GIT's argument that the bankruptcy court
26 exceeded its jurisdiction by "address[ing] liabilities or inhibit[ing]
27 collection of adjudicated obligations as between non-debtors."
(Opening Br. at 17 (#16).) It cannot reasonably be disputed that
28 GIT's claim against the debtor and the DOE is related to the debtor's
bankruptcy proceedings.

The Clerk shall enter judgment accordingly.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE